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No. 10-554

In the Supreme Court of the United States

BRADLEY J. STINN, PETITIONER,

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

The dissent by three Justices from denial of certiorari in *Robert K. Wong, Warden* v. *Anthony Bernard Smith, Jr.*, No. 09–1031 (Nov. 1, 2010) ("*Wong* v. *Smith*") (Alito, J., dissenting from the denial of certiorari) highlights the need for this Court's review of the issues presented in the instant case. Because the dissent constitutes "intervening matter not available at the time of the party's last filing," petitioner Bradley Stinn respectfully submits this supplemental brief pursuant to Rule 15.8 to discuss the relevance of *Wong* v. *Smith* to the present petition for a writ of certiorari.

DISCUSSION

Stinn filed his petition for a writ of certiorari on October 22, 2010. On November 1, the government waived its right to respond to the petition, notwithstanding its previous acknowledgements that the courts of appeals are divided on each of the issues presented in Stinn's petition. See Pet. 10-11.[1] On the same day as the government's waiver, Justice Alito, joined by the Chief Justice and Justice Scalia, dissented from the denial of certiorari in *Wong* v. *Smith*, asserting that the issue in that case, which is likewise presented by the petition in the instant case, is one that requires further guidance from this Court.

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[1] On November 2, 2010, the Court requested a response from the State of Oregon to the petition for writ of certiorari in another case presenting issues related to the Sixth Amendment's jury unanimity guarantee. *Herrera* v. *Oregon, petition for cert. filed* (U.S. Sept. 9, 2010) (No. 10-344).

Wong v. *Smith* reached this Court in a federal collateral attack on a state court trial. During deliberations in that trial, a juror sent the judge a note saying he was unable to convict because he thought the government's DNA evidence was unreliable. After receiving the note, the trial judge gave the jury a modified *Allen* charge, and also selectively commented on the evidence. See *Allen* v. *United States*, 164 U.S. 492 (1896). A short time after the trial court delivered its instruction, the jury returned a unanimous guilty verdict.

After exhausting his appeals in the California state courts, the defendant sought habeas relief in federal court, arguing that the trial judge had unconstitutionally coerced the jury's verdict. The district court, reviewing the state appeals court's decision under the standards of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. 2254(d), granted habeas relief, concluding that the trial judge's actions improperly coerced the jury, and that the state courts' holdings to the contrary unreasonably applied this Court's "clearly established" law. The Ninth Circuit affirmed. This Court denied the petition for writ of certiorari on November 1, 2010.

Justice Alito's dissent from the denial of certiorari recognized the critical need for guidance by this Court regarding the constitutional rule against coercive jury instructions, which is precisely the issue the instant petition presents. The denial of certiorari in *Wong* v. *Smith* leaves undisturbed Ninth Circuit law holding not only that an instruction in the circumstances of this case is coercive, but that the coercive nature of the instruction is "clearly established" within the meaning of Section 2254(d)(1), further evidencing the division in

the circuits on the question presented in the instant petition. Unlike *Wong* v. *Smith*, however, the instant case provides the Court with an opportunity to consider and address the constitutional questions presented here directly, without the overlay of AEDPA's requirement that the constitutional rule be "clearly established."

I. THE DISSENT IN *WONG* V. *SMITH* RECOGNIZES THE CRITICAL NEED FOR THIS COURT'S GUIDANCE REGARDING THE CONSTITUTIONAL PROSCRIPTION AGAINST COERCIVE JURY INSTRUCTIONS

Justice Alito's dissent recognized that "*[j]ust one* of this Court's decisions, *Lowenfield* v. *Phelps*, 484 U. S. 231 (1988), has addressed the constitutional rule against coercive jury instructions." *Wong* v. *Smith*, No. 09–1031, slip op. 3 (Alito, J., dissenting from denial of certiorari) (emphasis added). Accordingly, "clearly established law" is "sparse" with regard to demarcating the constitutional boundary between permissible instruction and proscribed coercion of a jury. *Ibid.* Because *Lowenfield* "held only that, on the totality of the circumstances present there, no unconstitutional coercion resulted," the "law in this area provides very little specific guidance." *Id.* at 3-4.

The Court acknowledged in *Lowenfield* that "*other combinations* of supplemental charges and polling" different than the particular circumstances presented in *Lowenfield* might transgress the constitutional boundary between instruction and coercion, 484 U.S. at 241 (emphasis added). In the twenty-two years since that decision, however, the Court has not offered further guidance regarding which circumstances cross the line into the constitutionally impermissible. In the meantime, the circuit split between the Ninth Circuit, which

deems the *Allen* charge given in this case coercive *per se*, and the Second Circuit, which equates the instruction's textual neutrality with a lack of coercion, has both deepened and widened into a broader disagreement among the courts of appeals and state courts of last resort. The Court should grant the petition for certiorari to provide "specific guidance" with regard to this significant and recurring issue. *Wong* v. *Smith*, No. 09–1031, slip op. 3-4 (Alito, J., dissenting from denial of certiorari).

II. THE COURT'S DENIAL OF CERTIORARI IN *WONG* V. *SMITH* LEAVES IN PLACE THE ESTABLISHED CIRCUIT SPLIT ON THE *ALLEN* CHARGE ISSUE RAISED IN STINN'S PETITION FOR CERTIORARI

In *Wong* v. *Smith*, the Ninth Circuit interpreted the principles set forth by the Court in *Lowenfield* as "clearly established" law warranting habeas relief in favor of the defendant. In doing so, the Ninth Circuit emphasized that the trial judge "knew not only the division of the jury but also the precise reasons the holdout juror, in his note, said he 'in good conscience [could] not vote for conviction,'" meaning that the judge's comments could reasonably be construed as "directed to the known concern of the holdout juror." *Smith* v. *Curry*, 580 F.3d 1071, 1082, 1084 (2009).

The denial of certiorari in *Wong* v. *Smith* leaves in place the Ninth Circuit's long-standing precedent recognizing that the *context* in which an instruction is given to a divided jury can make clear that it is directed at a holdout juror, thus rendering it impermissibly coercive. See, *e.g.*, *United States* v. *Williams*, 547 F.3d 1187 (2008); *United States* v. *Sae-Chua*, 725 F.2d 530 (1984). That interpretation of *Lowenfield* stands in

marked conflict with that of the Second Circuit, which as the government recognized below, rejects the Ninth Circuit's contextual analysis of *Allen* charges and instead focuses only on the language of the instruction in isolation. See Pet. App. 45a-46a.

III. In This Case, Unlike *Wong* v. *Smith*, The Court Can Resolve The Constitutional Questions Directly, Without The Complications Of Review Under AEDPA

Because *Wong* v. *Smith* involved a collateral habeas corpus attack on a state court judgment, it implicated the highly deferential AEDPA standard of review. See *Wong* v. *Smith*, No. 09–1031, slip op. 3 (Alito, J., dissenting from denial of certiorari) (under AEDPA, a state court decision will not be reversed unless it "involves not just an erroneous or incorrect decision, but an objectively unreasonable one"). By contrast, the instant petition for certiorari arrives at this Court on a direct appeal arising from a federal district court judgment. Thus, the Court can address the constitutional questions presented both in *Wong* v. *Smith*, and the instant petition, without the intervening overlay of AEDPA.

The instant petition presents a combination of holdout-targeting acts by the trial judge and jury majority whose coercive impact, when properly evaluated "in its context and under all the circumstances," *Lowenfield*, 484 U.S. at 237, plainly exceeds the coercion created by the trial judge in *Wong* v. *Smith*. In *Wong* v. *Smith*, after a holdout juror was identified, the trial judge gave the jury a modified *Allen* charge and commented on evidence tending to support a guilty verdict. Here, the trial judge not only delivered an *Allen* charge after the

identity of the holdout juror was divulged, the judge proceeded to remove the holdout juror from the jury, ostensibly for reasons unrelated to the juror's holdout status. Prompted by the jury majority's demonstrably false accusation against the holdout juror following the *Allen* charge, the trial court summarily dismissed the lone juror who had expressed "a doubt" about the government's case. Pet. App. 27a. The trial court's unconstitutionally coercive actions directly illuminate the unresolved circuit split that this Court should address by granting the petition.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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